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Searching for the Right Way to Count Veto Players in Argentina's First Democratic Decade

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In 1983 Argentina made the transition to democracy after the demise of a seven year military dictatorship entangled in an economic crisis, a lost war with Great Britain (the Falkland War) and the gruesome burden of its numerous victims and their relatives in the internal "Dirty War". The first civilian president after the last military junta, Raul Alfonsín was a member of one of the two main political parties of the new polity and a human rights activist, and the first president to hand power at the end of its mandate to another civilian president in a peaceful and lawful manner since 1928. Thus, despite some previous, short-term experiences with democratic institutions in the 20th century, punctuated by several military coups and military juntas, the 1983 transition can be considered a foundational moment of the Argentine democracy, triggering a difficult process of democratization and institutional building of the new political regime and leading to a difficult process of democratic consolidation.

In this paper I will adopt a processual perspective to analyze the manner in which the progressive formation of a stable pattern of elite interactions contributed to the most challenging task of the consolidation of the young Argentine democracy, that of institution building – a process of both progressive learning from past interactions for the political elites and one of a more formal accommodation to new institutional constraints. In other words, these two lines of evaluation of institution building amount to a lengthier process of institutionalization of rules and norms that is at the same time the result of injunctions from various actors and the incremental process through which institutions disentangle, build through norms and experience a stable and predictable scope of their legitimate action and consolidate barriers to the encroachment of other institutions and actors. This long-term dynamic unfolds itself following a logic of crystallization of the appropriate behavior¹ with respect to both formal rules and precedents and delineates the legitimate scope of action of actors embodying functions and taking actions in the name of certain objectives allegedly serving a democratically agreed upon vision of the common good².

However, my perspective will be a lateral one, in that I wish to draw some pertinent conclusions about the institutional dimension and the durability of this arrangement essential to democratic consolidation by assessing two interrelated issues. First, for the first half of the 1983-1994 decade, the analysis of the capacity of the government to respond to a regime crisis produced by radical pressures coming from the civil society on the one side, and from the military personnel on the other, around the issue of criminal trials for human rights crimes. I will assess the capacity of the regime

¹ I borrow this concept from James G. MARCH, Johan P. OLSEN, "The Logic of Appropriateness", ARENA Center for European Studies, *Working Papers*, WP 04/09.

² In this paper I am only interested in transformations towards democratic political orders and thus to institution-building dynamics in the horizon of values and norms of liberal democracies.

in the management of this major challenge from the vantage point of the executive-judiciary relationship in the mandate of Raul Alfonsín, the first democratic president and I will explore in the second part of this paper the dramatic deterioration of this relationship in the next presidential mandate, that of Carlos Menem. This latter point will allow to better approximate the sense of the lengthier process of institutional building and reform as a route of progressive formal and informal accommodation of political actors with the formal institutional constraints in a most difficult context, in an early democratizing stage during which new political actors are both the object and subject of the new rules of the game.

A growing scholarship concerned with the regime question¹ in third wave democracies and focused particularly on the Latin American region² has privileged an institutionalist revival among political scientists, preoccupied with issues like presidentialism³ in new and unconsolidated democracies, with a particular attention dedicated to legislative executive relationship and the institutional gridlocks at the national level⁴, electoral systems and their effects on the selection of candidates and on the new partisan systems⁵. This privileged concentration on the initial institutional choice, the result of either a process of negotiation among elites (authoritarian moderates and hardliners, opposition's radicals and moderates, as Huntington's game theoretic model set the standards and the various scholars privileged the modes of extrication and transition from dictatorship to democracy⁶) or of the evident

¹ Gerardo L. MUNCK, "The Regime Question: Theory Building in Democracy Studies", *World Politics*, vol. 54, no. 1, October 2001, pp. 119-144.

² IDEM (ed.), *Regimes and Democracy in Latin America. Theories and Methods*, Oxford University Press, New York, 2007.

³ See the seminal article of Juan Linz at the beginning of the 1990s, Juan LINZ, "The Perils of Presidentialism", *Journal of Democracy*, Winter 1990, pp. 51-69, and the large mass of scholarship that followed (Juan LINZ, Arturo VALENZUELA, *The Failure of Presidential Democracy*, The Johns Hopkins University Press, Baltimore, 1994; M. Steven FISH, "Stronger Legislatures, Stronger Democracies", *Journal of Democracy*, vol. 17, no. 1, January 2006, pp. 5-20; Jose Antonio CHEIBUB, *Presidentialism, Parliamentarism, and Democracy*, Cambridge University Press, New York, 2007 etc.) with sometimes significant amendments to Linz's and his followers' initial position. See for instance Matthew Soberg SHUGART, John M. CAREY, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, Cambridge University Press, New York, 1992; see also Barbara GEDDES, *Politician's Dilemma: Building State Capacity in Latin America*, University of California Press, Berkeley, 1994.

⁴ Gerardo L. MUNCK (ed.), *Regimes and Democracy in Latin America...cit.*, The most important chapter of this collective work from the perspective set above, is the one by Matthew Soberg SHUGART and Royce CAROLL, "Neo-Madisonian Theory and Latin American Institutions", pp. 51-103.

⁵ Scott MAINWARING, "Presidentialism, Multipartyism and Democracy. The Difficult Combination", *Comparative Political Studies*, vol. 26, no. 2, July 1993, pp. 198-228; Jose Antonio CHEIBUB, Adam PRZEWORSKI, Sebastian M. SAIEGH, "Government Coalitions and Legislative Success under Presidentialism and Parliamentarism", *British Journal of Political Science*, vol. 34, no. 4, 2004, pp. 565-587.

⁶ From the seminal work edited by Guillermo O'DONNELL, Philippe SCHMITTER and Laurence WHITEHEAD, *Transition from Authoritarian Rule*, Johns Hopkins University Press, Baltimore, 1986 to more recent studies by Terry Lynn KARL, "Dilemmas of Democratization in Latin America", *Comparative Politics*, vol. 23, no. 1, October 1990, pp. 1-21; Gerardo L. MUNCK, Carol Skalnik LEFF, "Modes of Transition and Democratization: South America and Eastern Europe in Comparative Perspective", *Comparative Politics*, vol. 29, no. 3, 1997, pp. 343-362.

disequilibrium in favor of the democratic opposition, was driven by a legitimate concern for the survival of these new, young democracies, an apprehension that soon proved quite judicious, as the various cases of illiberal¹, semi- or hybrid democracies² or more focused on Latin America, instances of *delegative democracy*³ illustrate it more recently.

The other strand of scholarship that organizes the intellectual horizon of my inquiry on the management of the issue of transitional justice in the limits set by the formal institutional setting, asks some difficult questions about the relationship between the process of democratic consolidation and the more short term transitional justice dilemmas centered on judicial, administrative and political measures about *how to deal with the past*. In most third wave democracies, these two issues were simultaneously the preoccupation of both elites and the society, even in such cases where one or both of them constituted only rhetorical issues and still await their attainment. Moreover, the impressive volume of scholarship dedicated to each of these two topics frequently relates one to the other, either trying to demonstrate that they are in a necessary manner connected and thus the progress in one dimension should be correlated with the progress in the other⁴ or, on the contrary, in order to illustrate how the two issues are essentially independent processes⁵ or even damaging to one another⁶.

From a comparative perspective, the case of the large degree of arbitrary violence perpetrated by the armed forces in Argentina during the 1976-1983 military juntas is just one instance of the Latin American experiences with military dictatorship and should be adapted in light of the various legal arrangements that the military juntas instituted in each national setting, and the various degrees to which the armed forces complied with the formal legal system or, on the contrary, preferred at times to act according to non-transparent orders along the military hierarchical chain of command. This observation is crucial to the extent that it illuminates a radical distinction between a rule-of-law abiding political order in a Kelsenian understanding of this principle and a state of arbitrary rule by sheer violence perpetrated by armed men⁷. This distinction is instructive both for the political theory of regimes and for the

to very recent reassessments of the transitology paradigm in Carsten Q. SCHNEIDER, *The Consolidation of Democracy. Comparing Europe and Latin America*, Routledge, London, 2008.

¹ Fareed ZAKARIA, "The Rise of Illiberal Democracy", *Foreign Affairs*, vol. 76, no. 6, November-December 1997, pp. 22-43.

² Larry DIAMOND, "Elections without Democracy, Thinking about Hybrid Regimes", *Journal of Democracy*, vol. 13, no. 2, April 2002, pp. 21-35.

³ Guillermo O'DONNELL, "Delegative Democracy", *Journal of Democracy*, vol. 5, no. 1, January 1994, pp. 55-69.

⁴ Anne SA'ADAH, "Regime Change: Lessons from Germany on Justice, Institution Building, and Democracy", *The Journal of Conflict Resolution*, vol. 50, no. 3, June 2006, pp. 1-21.

⁵ Barahona DE BRITO, "Truth, Justice, Memory, and Democratization in the Southern Cone", in Paloma AGUILAR, Barahona DE BRITO, Carmen GONZALEZ-ENRIQUEZ, *The Politics of Memory. Transitional Justice in Democratizing Societies*, Oxford University Press, New York, 2001, p. 151.

⁶ Jon ELSTER, "On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution", in Neil KRITZ, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace, Washington, 1995, pp. 566-568.

⁷ For a thorough discussion of the notion of rule of law in democratic and nondemocratic regimes, see Robert BARROS, "Dictatorship and the Rule of Law: Rules And Military Power in

more pragmatic dimension of defining who is susceptible to be punished in the new democratic regime. In this latter respect, those who committed crimes perpetrated in a more rule abiding authoritarian regime are more likely to use the excuse of having followed the orders and thus reduce the range of liable perpetrators to just a handful of superior decision makers, whereas in the case of more arbitrary rule in authoritarian regimes the attribution of responsibility for perpetrating human rights violations can be more "democratically" distributed to a wider range of actual perpetrators after the transition.

In the Argentine setting, the successful or, on the contrary, failed attempts to deal with the crimes of the past regime in its most egregious forms – torture, disappearances, murder, is a privileged indicator of the institutional strength of the new democratic regime, because the inherent logic of criminal trials as transitional justice is one of a confrontation between institutions of the state that should punish those individuals who, acting in the name of the state and formal institutions of the previous regime, committed heinous crimes against other individuals and groups. Thus, the institutional strength of the new democratic regime will also be discerned as a function of its capacity to punish the guilty all by discerning between individual culpability and institutional culpability (responsibility) and, furthermore, to punish without endangering the still fragile institutional setting. In this sense, the policies of transitional justice constitute a political act and a very difficult one, because the state is in the very uncomfortable situation of employing some institutions (usually the judiciary) for the assessment of the responsibility of other institutions or, more difficult still, for punishing the inappropriate (illegitimate, criminal) behavior of agents acting in the name of the very institution who years later has to condemn itself (the judiciary when responsible for helping criminal acts of a dictatorship).

By *democratization* I understand in this article mainly a process of transformation of the relationship between the state and the society in the very peculiar context of the legacies of an extremely violent state terrorism perpetrated by the previous regimes (both the civilian regime of Isabel Peron and the three military juntas that followed), a process to which both civil society movements and political elites actively contributed since 1983. Similarly, in defining the concept of *democratic consolidation* I again consider the historic events that marked the period of the transition and the first years of the young democracy, marred by several rebellions of the armed forces threatening the new regime with the repetition of past military regimes. Thus, the Argentine democracy is to be considered a consolidated regime only after the institutionalization of the army and its definite confinement to the barracks and away from their traditional role in politics as the ultimate veto player¹.

Although this is not the only condition for this complex process, it is an essential provision for the existence of a durable democratic regime, and I understand this state of durability in the sense given by Carsten Q. Schneider for the background concept of consolidated democracy²:

Pinochet's Chile", in Jose Maria MARAVALL, Adam PRZEWORSKI (eds.), *Democracy and the Rule of Law*, Cambridge University Press, New York, 2003, pp. 188-222.

¹ Juan Carlos CALLEROS, *The Unfinished Transition to Democracy in Latin America*, Routledge, London, 2009, p. 116.

² For his application of Giovanni Sartori's theory of the three levels of abstraction of concepts to the study of democratization, see Carsten Q. SCHNEIDER, *The Consolidation of Democracy*...cit., p. 8.

"A liberal democracy is consolidated if it is expected that it will persist (static notion of CoD). And, the consolidation of a liberal democracy is the process by which the time horizon of its expected persistence is extended (dynamic notion of CoD)"¹.

Obviously, a discussion should be devoted to the concept of liberal democracy itself, but for the limited task I assumed in this paper, I will use this narrow definition in the present analysis of the post-authoritarian Argentine polity by analyzing what I consider an essential and common dilemma at the heart of both the process of democratization of state-society relations through the overcoming of the abuses of the state terrorism era, and equally critical to the process of institutional building through the construction of a stable and formally institutionalized relationship² between the executive and the judiciary system.

For the first dimension, that of the democratization of state-society relationship, the dilemma is related to the challenges posed by demands for transitional justice – and especially criminal justice against those responsible for human rights violations during the "Dirty War". For the second process, related to the institutional dimension, the predicament of the political elites was centered on the issue of the independence of the judiciary from the encroachment of the president. Although the two issues, that of transitional justice on one side, and of the independence of the judiciary, on the other, seem two highly heterogeneous topics given the time horizon of their expected importance (a rather short-term saliency for the former, a definitely long-term, constant saliency for the latter in keeping with Schneider's definition of a consolidated democracy), I maintain that these two issues are worth being studied together in the context of the Argentine first democratic decade. This is the case because this period is defined by a high degree of *uncertainty*, in which actors and institutions operate under tremendous pressures concerning their very formation and consolidation³.

In other words, the Argentine post-transition period reveals a rare opportunity for social scientists to witness the negotiations between emerging elites unaware or incompletely aware of the balance of power between them, in a highly unstable political institutional environment, that is, a formative period for the future political system. I define the post-transition period as a formative one and I tentatively delimit this period as the first democratic decade, from the first free elections in December 1983 and up to the 1994 agreement for a constitutional reform (the Olivos Pact) between the two main political parties.

In light of my theoretical rational choice model borrowed from Geddes (2002), this first decade is defined as formative because during this time the new political elites, characterized as rational actors pursuing their *goals (first order preferences)* –

¹ *Ibidem*, p. 12.

² I advance this condition of a consolidated democracy as opposed to those practices defined by Guillermo O'Donnell as informal rules [so] "widely shared and deeply rooted [that] it may be said that these rules (rather than the formal ones) are highly institutionalized", see Guillermo O'DONNELL, "Illusions about Consolidation", in Larry Jay DIAMOND, Marc F. PLATTNER, *The Global Divergence of Democracies*, The Johns Hopkins University Press, Baltimore, 2001, p. 119. O'Donnell further gives the example of clientelism as an "extremely influential, informal and sometimes concealed institution".

³ Terry Lynn KARL, "Dilemmas of Democratization in Latin America", *Comparative Politics*, vol. 23, no. 1, October 1990, pp. 1-21/pp. 6-12.

the accumulation of power and their survival in positions of decision making authority – employ various *strategies* (*second-order preferences*) or policies in order to further their most-valued goals¹, and these strategies are subject to a high degree of instability, that I attribute to two main causes. First, the interaction of each actor's sphere of preferences with the sphere of preferences of contending political actors (the opposition), a competition in which the winner will be the actor most capable of learning from past errors and employ the institutional environment to his own advantage. The second cause of instability is the institutional environment, which is both a source of constraints on the behavior of the elites and a privileged field of competition of these actors contending for the very (re)definition of the institutional building through strategic reforms of some key institutions. As I will further analyze in the empirical section of this paper, an essential point of contention of the new political elites in this formative period was the sphere of autonomy of the judiciary in the new political game, and the stage of this contention was the nature and scope of the Supreme Court's prerogatives, particularly in relation to the progressive definition of the scope of the executive function by the very divergent personalities of its first two office-holders, Raul Alfonsín and Carlos Menem.

I find Geddes' theoretical model a particularly useful one in analyzing the post-transitional Argentine period as a formative interval for the creation of future patterns of elites' interactions and of institutional building in the particular instance of the executive-judiciary relationship, and, given my emphasis on the interaction of rational political actors in this period, I will conceptualize their interactions as an intra-elite competition for the definition of veto players of the Argentine polity. Geddes' theoretical model makes a very convincing case for the analysis of actors' behavior and interactions as players essentially motivated by their specific goals (gaining and maintaining power and the benefits deriving from its use), but, and most importantly, as players inside a given set of institutional constraints and inputs of contending actors, that they have to partly accommodate, and partly bend:

"Contrary to the claims of critics, most rational choice arguments about political behavior actually give primacy to institutions and other contextual circumstances as causes of outcomes. The rational choice approach focuses its attention on the constraints imposed on rational actors – the institutions of a society [...] Individual action is assumed to be optimal adaptation to an institutional environment, and interaction between individuals is assumed to be an optimal response to each other. Therefore, the prevailing institutions [...] determine the behavior of the actors, which in turn produces political and social outcomes""².

This rational choice model that I adapted for this analysis, focused on actors' goals and their strategies for attaining them, but equally focused on the institutional and contingent constraints on actors' strategies³, uses George Tsebelis' definition of veto

¹ Barbara GEDDES, *Paradigms and Sand Castles, Theory Building and Research Design in Comparative Politics*, University of Michigan, 2003, pp. 177-206.

² *Ibidem*, p. 188. George TSEBELIS, *Nested Games: Rational Choice in Comparative Politics*, Berkeley, University of California Press, 1990.

³ I emphasize this so as to point to Geddes' effort to illuminate a useless confusion concerning rational choice models, as the result of terminological misunderstandings. As she nicely and succinctly disentangles some concepts, preferences should be considered separately from the

players as "an individual or collective actor whose agreement is required for a policy decision"¹. I will adapt it, however, to the peculiar democratic state of Argentina in its 1983-1994 decade and pay attention to the informal strategies some actor will employ in order to control the exercise of the veto rights of other actors and draw a conclusion only at the end of this paper on the issue of the exact number of veto players in the post-1983 Argentine polity.

Carsten Schneider's conceptualization of consolidated democracy is differentiating between multiple levels of analysis of its static and dynamic dimensions, these levels being institutional, attitudinal, and behavioral², and he opts for a behavioral perspective on COD applied to a medium number of cases in his study. However, he underlines the fact that the choice of a unilevel or, on the contrary, multi-level analysis is highly dependent on the number of cases under scrutiny and that a multi level analysis is a pertinent choice only for very small N studies:

"Despite its focus on empirically observable behavior of politically relevant actors, my concept is embedded in institutional theory because actors are required to perpetuate through their behavior those formal and informal institutions that are at the core of any democratic regime. Hence, democracy is consolidated 'whenever the enforcers of democratic institutions themselves can be counted on with very high probability to behave in ways compatible with, and oriented toward, the perpetuation of formal institutional rules'"³.

This conceptualization of democratic consolidation at the institutional, attitudinal and behavioral levels explicitly follows the path breaking theory by Linz and Stepan in 1996⁴ and sees this process as both the result of a *cost-benefit calculation of the elites*, reaching the conclusion that the costs of anti-system attitudes are much higher than the costs of negotiating inside the democratic game, and also, and essentially, the result of a lengthier *process of habituation* with the democratic rules, habituation or learning on the part of the elites and the society at large, thus making democracy the "only game in town".

Considering my choice for a single case study of Argentina's first post-transitional decade and the two main issues I have selected for capturing the political processes of

strategies to attain them, which aren't always the most preferred path for the actors or their supporters: "Within rational choice arguments, politicians' policy and institutional preferences are strategic behaviors aimed at achieving their goal of remaining in office. Policy preferences may alter radically in response to changed circumstances, but this does not imply that preferences, in the rational choice sense, have changed [...] *Policy and institutional preferences are always endogenous in rational choice arguments, as critics claim they should be; but they are called strategies, not preferences*", see Barbara GEDDES, *Paradigms and Sand Castles...* cit., p. 183 (my italics).

¹ George TSEBELIS, "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism", *British Journal of Political Science*, vol. 25, no. 3, July 1995, pp. 289-325/p. 293.

² Carsten Q. SCHNEIDER, *The Consolidation of Democracy*, cit., p. 14.

³ S.E. HANSON, "Defining Democratic Consolidation", in R.D. ANDERSON Jr, M.S FISH, S.E. HANSON, P.G. ROEDER (eds.) *Postcommunism and the Theory of Democracy*, Princeton University Press, Princeton, 2001, pp. 126-151, quoted in Carsten Q. SCHNEIDER, *The Consolidation of Democracy*, cit., p. 16.

⁴ Juan LINZ, Alfred STEPAN, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*, Johns Hopkins University Press, Baltimore, 1996.

democratization and consolidation, I find that a rational choice explanation as I already described it above, attentive both to elites' choices and the institutional settings, goes in the same sense as Schneider's and Linz and Stepan's multi-level analysis, at the intersection between institutional, behavioral and attitudinal dimensions.

This paper will cover the period during Raul Alfonsín's (Union Civica Radical) presidential mandate and that of his successor and member of the main competitor political party (Partido Justicialista, the Peronist party), Carlos Menem, and see how the democratization of state-society relations through measures of criminal justice and the issue of institutional reform and particularly the independence of the judiciary, were dealt with by the two presidents. As I already stated in the introductory part, far from being two separated issues, the two are very much dependent on one another, in the sense that generally, changes in one dimension are also revelatory of some changes in the other. Moreover, I hypothesize that in the unconsolidated Argentine democracy of the 1980s and 1990s, the degree of activism of the courts in punishing human rights perpetrators is indicative of the independence of the judiciary and any regression of this activism is to be expected as a result of exogenous pressures on this branch. Although this litmus test will serve my inquiry for a significant part of the period covered, the solution found to this topical challenge posed to the new regime does not exhaust the more durable question of the independence of the judiciary. However, by privileging a period of crisis I hope to extract some pertinent observations about the manner in which new political actors (Carlos Menem) will alter the institutional relationship between the executive and the judiciary as a direct lesson extracted from the experiences of their predecessors (Raul Alfonsín).

Although the observation concerning the relationship between the independence of the judiciary and the adoption of transitional justice measures is not a surprising one, as I will make it apparent in the historic description of events relating to Argentina's experience, what I think it's original in my paper and significantly contributing to the already massive scholarship dedicated to the Argentine democratization is the connection I establish between the two dimensions announced in the first part, the democratization of the state-society relationship through recognition of past wrongs and punishment of state crimes and the institutional dimension of democratic consolidation.

In other words, I operate in this paper with multiple temporalities and this should contribute to a diachronic perspective on the process of democratic consolidation of Argentina, as I identify 1) a short term and highly dramatic horizon set by transitional justice as a societal demand and equally as a necessary strategy of the new polity in order to institutionalize the army and confine it to a more limited scope of legitimate action and 2) a long term process of elite negotiations and progressive accommodation in the search of a stable institutional arrangement both legitimate (accepted by all as the only game in town) and also, preferably, one aiming at assuring the respect of rule of law and of the principle of checks and balances. This latter point is all the more important in light of the considerable scholarship focusing on the significant dangers posed by a strong executive in a young democracy, as I briefly mentioned in the introduction. In this sense, although this largely goes beyond my present inquiry, the Argentine experience with the institutional reform of the judiciary and the executive serves for a comparative perspective in the larger continental perspective and maybe even for some post-Soviet presidential regimes, whereas its experience of significant successes in transitional justice through criminal trials could be readily integrated in the comparative analysis of other countries dealing with human rights crimes perpetrated by ancient regimes.

The two time horizons will intersect as a double perspective on the competition of the elites concerning the broader issue of the scope of the judiciary (the degree of its independence in the new polity) and the issue of transitional justice, and the conceptualization of this relationship, finally, as one instance of the essentially political struggle for the control of the number of veto players in the new polity. The privileged lieu for the observation of the number of veto players in the Argentine politics is the executive seat, a function that proved to be a highly sensitive one to the personality of its incumbent, as I will show further in my discussion. Given the constantly imminent encroachment of the executive on the judiciary, whose resorts I will deal with equally, the unresolved number of veto players in the Argentine polity is responsible for a constant shift between *regime instability* and *government instability*¹. I will proceed in my analysis with a constant concern with this issue as well, as this could provide an additional measure of approximation of the democratic consolidation and predict probable institutional sources of tension in the long term.

The first free elections in 1983 brought to power Raul Alfonsín, the presidential candidate of the UCR (Union Civica Radical), a moderate social-democrat politician, and an activist of human rights during the military regime. His surprising victory over the Peronist candidate, largely expected to win the first elections due to the support of the blue collar workers traditionally linked to the Peronist movement, was actually greatly enhanced by his rigid position during the presidential campaign in favor of criminal trials against army officers during the last military dictatorship and thus refusing any form of amnesty in their favor. During the first month of his mandate, a National Commission on Disappeared Persons, CONADEP (La Comisión Nacional Sobre la Desaparición de Personas) was formed in order to reveal the real dimensions of the human rights crimes of the four military juntas (under the army leaders General Jorge Rafael Videla, General Roberto Viola, General Leopoldo F. Galtieri and General Reynaldo Bignone as presidents) and establish both the identities of the victims and of the perpetrators, without however endowing the CONADEP with the right to file official complaints against those suspected of such crimes and could only help the work of the prosecutors.

However, the most burdensome set of measures, also initiated immediately after Alfonsín's nomination, focused on denying the impunity that the last military junta tried to institutionalize in an amnesty law in the last days of its rule and bring to justice the cases of the most serious crimes against human rights. On April 28, 1983, after the start of negotiations with the political parties for the reintroduction of free elections, the last Junta issued a "Final Document on the struggle against subversion and terrorism" and tried to amend the Constitution in order to institutionalize an implicit amnesty law for most military personnel, under the pretext of due obedience. Furthermore, just two weeks before the presidential elections were held in December 1983, the Junta issued a new, explicit amnesty law, La Ley de Pacificación Nacional that, given the total loss of legitimacy of the army, had the contrary effect, giving a boost to Alfonsín's campaign against the military impunity², at a time when the Peronist candidate, largely considered the winner, declared to be more willing to

¹ George TSEBELIS, "Decision Making in Political Systems...cit.", p. 289.

² Americas Watch Report, Truth and Partial Justice in Argentina: An Update, April 1991, p.15, report available at <http://www.hrw.org/en/node/78241> (AWR from now on), (accessed on 1.05.2010).

negotiate an amnesty with the army leaders. Thus, I can say that Alfonsin mandate was to a large extent a *carte blanche* given to the candidate who seemed decided to a higher degree to ignore the amnesty forced by the officers in the Constitution.

In a slow paced but thoughtful strategy, Alfonsin first sent a legislative initiative to the Congress which ordered the opening of all cases of human rights violations under the authority of the Supreme military council, thus allowing the military body to administer justice to its own members found guilty along the chain of command, that is, setting limits to the scope of justice, by actually focusing only on high ranking military officers. However, this presidential initiative was modified in the Congress, where the UCR enjoyed a relative majority, so that, irrespective of the results in the military courts, the cases should also be sent to the civilian Federal Courts of Appeal after 180 days of consideration by the military courts. Without exception, the rulings of the military courts issued exculpatory conclusions for each officer or police worker under accusation, and thus the civilian courts took over the cases and just six months after the issuing of Alfonsin's law, 2 000 criminal complaints had been brought before the civilian Courts of Appeal. However, the obvious reluctance of the Military Tribunal to prosecute those brought to its attention was dealt with by each Federal Court of Appeal with various degrees of severity, sometimes responding with a strong activism (in Buenos Aires Province) or, on the contrary, with great lenience (for example in the province of Cordoba), allowing for the extension of the 180 days proviso¹.

In December 1994 the leaders of the military Juntas were brought to justice before the Federal Court of Buenos Aires, and after four months of hearings, most of these leaders were sentenced to life imprisonment or lengthy periods of detention and loss of civil rights. Also, and most significantly for future trials all along the next two decades, the court issued the order to further the prosecution of all those suspected of human rights crimes and who "were in command of the areas and sub-areas of defense during the campaign against subversion and against all those who had operational responsibility in the actions"², thus pronouncing a negative verdict to the request of numerous officers to be exculpated for simply following orders from superiors, according to the "obediencia debida" doctrine. However, this legal action didn't stop here, and reached the Supreme Court in 1986 at the request of both the Junta members and of the prosecutor, the latter hoping for longer terms against some officers. Finally, the Supreme Court backed the rulings of the Federal Court of Buenos Aires and proved no leniency in favor of the accused.

What is crucial at this stage of the prosecutions, is that the initial intention to prosecute the highest military personnel in an essentially symbolic gesture of the new political elites, triggered in fact an avalanche of prosecutions of officers of inferior ranking, and the dimensions of this activism of the lower courts, of their prosecutors and of the Argentines suddenly founding the courage to file complaints that evidently seemed to be effective, backed by a judiciary willing to take the cases, proved to go beyond the boundaries set by Alfonsin and his team. Thus, the executive's initial move was first modified by the rulings of the Congress, when this body decided to make mandatory the appeals to the Federal Courts, and subsequently by the judiciary, when the courts started to take more and more cases of crimes perpetrated by all kinds of military and police workers, irrespective of their ranking or of their responsibility in giving orders or simply following them.

¹ AWR, p. 24.

² The Federal Court pronouncement, in AWR, p. 29.

At the beginning of 1986, this avalanche of judicial activism started to stir the ranks of the military, which in turn pressured the executive to find a balance between the societal demands for justice and the military threats with rebellions and the end of the young democracy. Thus, in April 1986, the Minister of Defense encouraged the General Prosecutor of the Supreme Military Council to limit its accusations only to those cases in which the responsibility of the accused was evident, and to make efforts to shorten the processes, in order to calm the soldiers in the barracks. As the legal specialists Enrique Dahl and Alejandro Garro, who worked with the prosecutor of the Buenos Aires Federal Court observe, the Ministerial Directive was in fact a form of amnesty for those accused and for whom it wasn't immediately evident that they exceeded the orders received¹. This order, if applied by the courts, had to ignore most of the cases of abuses against civilians in the "Dirty War".

This situation illustrates how the judiciary's activism can still be eluded by one simple executive move, through which the key actor – the prosecutor – is called to modify his initial strategy (retribution corresponding to the gravity of the crimes) by extraneous motives and objectives, more political in nature, dictated by short-term urgencies of the political context. In 1986, the political context urged the executive to temper the activism of the judiciary in order to avoid a new coup d'État. In light of this imminent threat, made evident by some local revolts in various regions of the country, Alfonsín took a decisive step on December 24, 1986, by issuing the Full Stop Law (*Ley de Punto Final*). This decree ordered the blocking of all charges brought by victims and of all summonses of the courts "related to the establishment of violent methods of political action"² after a 60-day interval. Nevertheless, the decree explicitly exempted from this ruling any case that dealt with the kidnapping and transfer of minors and other crimes without any justification.

As the two witnessing experts underline, this executive decree turned against its initiators. "By shifting the burden to the courts to permit accused murderers and torturers to escape prosecution, the law backfired on the government"³, because most civilian courts mobilized to such a degree in order to include the highest number of cases before the 60-day deadline, that very few judges profited from their traditional right to have the month of January free, and instead produced a higher number of cases to be submitted to prosecution than in the absence of Alfonsín's decree. A further pressure coming from the Minister of Defense through the General Prosecutor asked the Federal Courts to deal only with those cases of the most grave human rights violations (kidnapping of minors, and other similar "atrocities"), thus in fact repeating the Full Stop Law's wordings.

However, this third attempt of the executive to block the activism of the courts was actually a form of recognition of its lack of power over the judiciary branch, which in turn backfired on the executive's legitimacy in its negotiations with the army officers threatening to rebel. At this stage, in the spring of 1987, Alfonsín already had lost the support of a significant part of the civil society because of his initiatives in favor of partial amnesties, and seemed a weak president in the eyes of the military, given his inability in curbing the activity of the Federal Courts, backed by a majority of the

¹ Neil KRITZ (ed.), *Transitional Justice, How Emerging Democracies reckon with Former Regimes*, US Institute of Peace, Washington, 1995, p. 360.

² *Ibidem*, p. 361.

³ *Ibidem*, p. 362.

Supreme Court. In light of this latter point, the 1987 Easter rebellion of various sectors of military officers in Buenos Aires and in other provinces is a significant indicator of the incomplete institutionalization of the army in the new game and its rules, and offers an explanation for the radical change of policy in the sphere of transitional justice on the part of Raul Alfonsín, the candidate who in 1983 won the presidential seat for promising resolute rulings against the human rights criminals. In the face of the serious menace posed by the lower ranking officers's revolt against the continuation of trials and the conviction of numerous military and police personnel that, they argued, only followed the orders along the hierarchical line of command. The *carapintada* (the soldiers with painted faces) revolt was soon defused, following a visit of the president to one of the bases of the insurrectionists, after which Alfonsín returned to the Plaza de Mayo, the *lieu de mémoire* of the human rights activists, and calmed the worried citizens gathered there, letting them know that democracy was still in place.

Even so, very soon after these events, the legislative issued the Law No. 23521 at the initiative of the executive, known as the law of due obedience (*obediencia debida*), that had to interrupt the justice cascade triggered in the civilian courts, by introducing some amendments brought from the Code of Military Justice, basically stating that the prosecution will be lifted for any one "who did not have decision making capacity or who did not participate in the formulation of the orders", thus covering crimes like torture, murder, arbitrary arrest and the refuse of the habeas corpus demanded by the relatives of the victims¹. The new law's scope was so broad, that most of the accused and those cases still pending on the gathering of proofs became from one day to the next cases out of the reach of the courts and most of those found guilty of serious crimes became innocent, despite any proof, however evident, of their actual crimes, by being transformed in mere instruments of a handful of generals who formulated the big lines of the repression. Moreover, the law prevented the opening of new cases in situations in which the accused was not defined as a person responsible with the formulation of the actual criminal plans and commands. This radical change of attitude of the executive, averse to the initial promises for justice in favor of the victims, led to a split between the five judges of the Supreme Court.

The main point of tension inside the Supreme Court centered on the complaint furthered by the human rights groups against the due obedience law, because this law actually violated the principle of separation of powers². One of the Supreme Court judges, the representative of the Peronist party, nominated by Raul Alfonsín at the beginning of his mandate as a pledge for his neutrality, considered that the legislative initiative encroached on the proper prerogative of the judiciary, because "the due obedience law prevented judges from deciding whether the circumstances described in the law (if the accused was responsible for giving orders or was simply an unconscious follower of anonymous orders from above, m.n.) actually occurred, by creating a conclusive presumption³ and thus imposing a preordained opinion on a supposedly independent judge. Despite the final decision of the Supreme Court in favor of the legislative act, it was evident that this decision was a political one, whatever

¹ Kathryn LEE CRAWFORD, "Due Obedience and the Rights of Victims", in Neil KRITZ (ed.), *Transitional Justice...cit.*, p. 364.

² *Ibidem*, p. 368.

³ Or an *irrebuttable presumption*, "a presumption of law that cannot be rebutted by evidence and must be used despite any evidence to the contrary", see <http://www.lectlaw.com/def/c205.htm> for further discussion of this concept (accessed on 1.05.2010).

the moral arguments on which it stood (the most powerful being the one urging for the full stop of the trials in order to appease the officers and preserve the democratic regime). The most evident acknowledgment of this observation is the argument furthered by Raul Alfonsín in 1993, four years after the end of his mandate:

"The moral legitimacy of measures such as the Do Obedience and the Full Stop Laws depend on whether their consequences are socially beneficial"¹.

This radical change in policy preferences in the second part of Alfonsín's mandate is all the more dramatic for him considering the fact that he also had to deal with a strong opposition at the time, coming from his own party, the UCR and that this move obviously affected his public image and any future electoral bid. Nevertheless, the president's decision was at that point in time considered to be the best way to balance the two demands, the one coming from the society (truth and justice for the victims and their survivors) and another one coming from an informal veto player, and an irregular one for that matter, too weak to control the new democratic game (as opposed to the Brazilian and the Chilean case, in which the army kept a strong foothold in the new democracies as constitutional veto players²), but still sufficiently strong to impose its view on selected policies strictly dealing with its integrity as a body. However, it is notable in the Argentine case the fact that the breadth of this dimension of transitional justice, the criminal trials, obviously the most difficult to accomplish in any democratizing setting, proved to be an exceptionally large one in comparison with similar experiences in the South American continent or in the post-communist regimes. Although the merits for the initiation of this exemplary process of criminal justice belong to an active president who triggered both the legislative and the judiciary activism in this matter, at a certain moment in time, this process gained a stimulus that put it on its own tracks and led to very much unexpected developments for all the important actors.

In the next section I will briefly illustrate how this process of autonomization was made possible by the initial decision of the executive to secure total independence for the judiciary branch, and also taking into consideration another crucial variable: the very low degree of *participation* and *institutionalization* of the judiciary in the previous, authoritarian regime.

Immediately after the transition from an authoritarian rule, two essential issues relating to the autonomy of the justice system are (1) the quality of judiciary body both as a set of professionals endowed with sufficient means to act according to their mission and as a group of individuals autonomous from exogenous pressures; and (2) the legal system under use. In the Argentine case, these two issues didn't burden the new democratic regime because the ancient regime made very little efforts to subdue the justice system and use it in its repressive mechanisms during the "Dirty War" and because during the first months of the Alfonsín mandate the executive took significant steps to guarantee its independence.

In what concerns the legacies of the prior authoritarian regime, these were minimal because the military juntas did little efforts to give the appearances of acting

¹ Raul Alfonsín, in Neil KRITZ (ed.), *Transitional Justice...cit.*, p. 381.

² Or *institutional veto players* in George TSEBELIS, "Decision Making in Political Systems... cit.", p. 302.

according to the rule-of-law principles. Immediately after the 1976 coup, the first military junta issued a number of "institutional acts" that were supposed to add to the constitutional act and allow them to elude the formal rules of a democratic regime, given their fight against terrorism. This further allowed them to make arrests, imprisonments and even to administer justice in cases involving civilians according to the military criminal code and to some arbitrary amendments to the old criminal code and also, most significantly, without accepting any form of accountability for their acts. That means, for instance that the authorities were never made to respect the habeas corpus principle during that period, requested by the relatives of those arrested without warrant, and could even deny having someone in their custody. However, even these "institutional acts" imposed by the junta generals were actually ignored, because the commands were in fact given following secret plans and orders along the chain of command to inferiors¹.

Moreover, more than 80% of all judges were forced to resign soon after the installation of the first military junta, thus making possible for the preservation of the integrity of much of the judiciary body after 1983 and a swift return to the old Constitution and legal codes. This swift transformation was therefore made possible by the inability of the army to institutionalize itself and erect a stable political regime, and instead only succeeded in maintaining a short-lived "political situation"², that finally collapsed at the moment when the civilian elites decided to collaborate in reinstalling a democratic system.

And as to the first measure taken by Alfonsín concerning the legal body, these were strategic in consolidating its integrity and autonomy. The president acted in this sense first by nominating the five members of the Supreme Court from the entire political specter, including a Peronist judge and other representatives of the opposition parties, and he rapidly moved to promote young judges and prosecutors, irrespective of their political leaning, free from any injunction from the military elite. A comparison with similar political situations in Brazil, Chile or Uruguay reveals one essential condition that set the process of criminal trials on the right path in Argentina, and lacked to various degrees in all the other countries:

"Argentina's transitional justice efforts were far more radical than Brazil's. The lack of integration of and consensus between judicial and military elites was exploited by civilian politicians who were able to divide and rule both corporate groups. The truth commission and the trials shattered the wall of silence around the dirty war disappearances and punctured the military's impunity. Elected presidents moved aggressively to slash military prerogatives, prestige, and resources, while purging the judiciary and maintaining its subordination to the judiciary. Argentina's TJ has not been entirely successful in that it is subject to the progressive-regressive cycle alluded to earlier, in which measures taken by one government are undone by its successor. But it has not been restricted by the immobilism that I find in the Brazilian case"³.

¹ AWR, p. 6.

² Gerardo L. MUNCK, *Authoritarianism and Democratization, Soldiers and Workers in Argentina, 1976-1983*, The Pennsylvania State University, University Park, Pennsylvania, 1998, see especially chapter 5, "The Dynamics of a Political Situation in Argentina, 1980-1982", pp. 105-132.

³ Anthony W. PEREIRA, *Authoritarianism and the Rule of Law in Argentina, Chile, and Brazil. Political (In)justice*, University of Pittsburgh Press, Pittsburgh, 2005, p. 167.

Thus, the (political) space left open by the complete delegitimation of the army after the seven year dictatorship allowed for the isolation of this actor in the new democratic game, a situation which proved impossible in Brazil or Chile, where the army maintained the role of a constitutional veto player beyond the moment of transition¹, enjoying discretionary power in some "reserved domains"². As Pereira succinctly puts it:

"If in Argentina wholly extrajudicial repression was the norm, Chilean repression from 1973 to 1978 was a military usurpation of judicial power, with the complicity of the legal establishment"³.

However, the comparative success of Argentina in dealing with the crimes of the military dictatorship must be balanced by a pragmatic analysis of its regime instability during Alfonsín's mandate. This instability and the two main occasions of radical menace against its integrity are to be considered as consequences of the presence of one informal veto player – the army, and one constitutional veto player – the Courts (Supreme Court in final instance) whose formal prerogatives are checked by the executive along partly irregular lines, stirring the suspicion of encroachment on its activity when the "urgency of the day" requires so, and thus paving the way for the arbitrary use if this justification for future presidents, as I will illustrate it in the case of Carlos Menem's pervasive use of this *precedent*.

In a final observation before opening the analysis of the second half of the decade under study, when do political actors (especially the presidents) decide to act with sufficient restraint so as to allow a sufficient scope of action to the judiciary as an additional veto player, and when do they decide to deny the judiciary such scope of action by ad-hoc measures? This question relates to a growing scholarship focused on Latin American presidential regimes and particularly to the question of "when do politicians take actions to promote the development of more powerful judicial branches"⁴.

The new general elections brought to power the Peronist party (Partido Justicialista) and the president Carlos Menem. As a consequence of the experience of the crisis-ridden UCR mandate and presumably also because of the pact between the army and Peronistas in 1983, agreeing to amnesty the all crimes of the dictatorship, Menem issued in 1989 a presidential pardon for those accused of human rights abuses. A much more incisive figure, Menem started a very active mandate during which he crushed a last military uprising in 1990 and transformed the executive, in the locus of effective authority over the entire political system.

In order to put an end to any future threat coming from the men in uniform, he reduced the army budget, abolished the draft and cut all financial means that until then

¹ Manuel Antonio GARRETÓN, "Chile 1997-1998: The Revenge of Incomplete Democratization", *International Affairs* (Royal Institute of International Affairs 1944-), vol. 75, no. 2, April 1999, pp. 259-267.

² Juan LINZ, Alfred STEPAN, *Problems of Democratic Transition and Consolidation...*cit., pp. 205-207.

³ Anthony W. PEREIRA, *Authoritarianism and the Rule of Law in Argentina, Chile, and Brazil...*cit., p. 168.

⁴ Jodi FINKEL, "Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change", *Latin American Research Review*, vol. 39, no. 3, 2004, pp. 56-80/p. 57.

permitted the military to dispose of significant resources guaranteeing its autonomy from civilian control¹. By this, Menem probably responded to another major problem of Latin American countries in general, that is, the corruption enhanced or at least tolerated by the participation of high ranking officers in civilian affairs. This action could also aim at further legitimating the state and its civilian leadership as the unique decision-maker in the question of the budget and as the only spender of the public money, insulating the army in a much weaker, dependent, position. Chile's state-owned copper mining industry and the military's share in its profits could constitute a valid case for a larger comparison of the means by which the army assures for itself an independent position in its relationship with the government.

If the military question ceased to be a salient problem during Menem's presidency, other democratic successes of the former Alfonsín executive became more and more fragile in the next decade. This is where the presidential system variable crucially intervenes. Menem's first mandate, significantly helped by a strong majority in the Congress and the total support of all the labor unions' leaders, who during his mandate refrained from the tactic of nation-large strikes, led to a pervasive use of the presidential prerogatives and finally to the abuse of its legal means especially in the relationship with the judiciary branch. In fact, the Supreme Court is a privileged terrain for the broader assessment of the grave deterioration in the quality of the Argentine democracy in the second half of this decade.

During the Alfonsín's mandate, the Supreme Court enjoyed total independence and acted as a transparent and neutral actor of the political game. Its composition of moderate justices from both parties and some smaller political faction assured a sound and non politicized activity and acted according to the democratic principle of checks and balances². Menem acted in the exact opposite direction, justifying his brutal interventions in the activity of the Supreme Court by invoking economic and social reforms much needed by the Argentinean society and which were slowed down by the activity of this institution. He not only interfered with its prerogatives, but also modified its structure, from initially five justices to nine, in order to forge a majority favoring his executive supremacy. He therefore nominated close friends and ex associates, as the new judges openly acknowledged their past collaboration³, together with their determination to support the president in taking completely the reins of power in order to further the economic reforms. This brutal move to modify the structure of the Supreme Court was a much debated issue at that moment, as this act was made possible by a number of irregularities, such as pressures exercised on some of the judges nominated by Alfonsín to retire or assume some ambassadorship functions aiming in the most see-through way to neutralize those members who opposed Menem's policies, and when this strategy failed because of the staunch refusal of the judges to leave, Menem pushed this even further, by passing through the Peronista-controlled Congress the modification of the Court's structure. From five judges, the new Court was set up to include nine members, and Menem swiftly nominated the four new judges. In response to such an obvious encroachment on the independence of the Court, one of the old judges decided to quit in protest, thus

¹ Scott MAINWARING, Frances HAGOPIAN, (eds.), *The Third Wave of Democratization in Latin America: Advances and Setbacks*, Cambridge University Press, New York, 2005, p. 68.

² Jodi FINKEL, "Judicial Reform in Argentina in the 1990s...cit.", p. 62.

³ *Ibidem*, p. 69.

finally allowing the president to enjoy a secure majority. In this respect, it is significant to consider the explicit acknowledgement of one of the judges nominated by Menem with respect to the Court's scope of activity:

"I cannot have an interpretation which is contrary to the government; I must have one which is favorable to its decisions, because it was elected by the people", further adding that [the role of the Supreme Court is] "to go along with the politics of the President"¹.

An essential observation made by Christopher Larkins is that Menem's strategy actually never intended to modify the prerogatives of the Court, so as to limit its jurisdiction or elude its opinion. On the contrary, the Court became the most solid instrument of legitimization of the president's decisions, without any fear of being kept accountable. Thus, another comparison between the Alfonsín's mandate and Menem's mandate is the use and abuse of "Decrees of Necessity and Urgency"² by the two presidents. While Alfonsín made use of this power only ten times in almost six years, Menem used them for 545 times in six years. In this respect, Larkins notes that:

"The constricted impartiality and insularity of the Argentine courts were evidently not accompanied by a reduced constitutional scope of authority. The Supreme Court continued to review cases on a wide array of issues [...] Particularly, the court has set solid precedents on the extent of president's decree authority, civil-military and federal-provincial relations [...] The key difference is that on virtually all of these occasions, the supreme court's decisions either directly supported or strongly favored the president's policies"³.

By employing a very different strategy than the one used by the military juntas during the dictatorship, the president managed however to neutralize the judiciary. Instead of eluding the courts, and issuing some arbitrary "institutional acts" as the army did, Menem employed a more subtle strategy of curbing this institutional obstacle by changing the very rules that shaped the judiciary body and assured its independence. The most dramatic observation in this sense is that the very large space of action open for Menem to modify the rules of the game was made possible not according to constitutional prerogatives of the presidential function, but by a convergence of contingent and advantageous situations. Enjoying a large Peronista legislative majority, Menem profited from this situation in order to pass executive decrees that weren't actually constitutionally sanctioned, but a last resort possibility in cases of extraordinary circumstances:

¹ Christopher LARKINS, "The Judiciary and Delegative Democracy in Argentina", *Comparative Politics*, vol. 30, no. 4, July 1998, p. 429.

² Delia Ferreira RUBIO, Matteo GORETTI, "When the President Governs Alone. The Decretazo in Argentina, 1989-1993", in Matthew SHUGART, John CAREY (eds.), *Executive Decree Authority*, Cambridge University Press, New York, 1998, pp. 33-61/p. 34 for a discussion of "paraconstitutional decrees" and the disregard of rule of law principles by Carlos Menem's excessive use of decrees (the phenomenon of *decretazo*).

³ *Ibidem*, p. 432. See also pp. 436-437 for a comparative assessment of the strategies to curb the independence of the judiciary in more authoritarian regimes.

"NUDs (Need and Urgency Decrees) are decrees issued by the executive that regulate matters or adopt policies that usually are the responsibility of the Congress. When the President issues a new NUD, he 'makes law', taking to himself the congressional authority to repeal and modify laws. Historically, NUDs have been justified by extraordinary crises or emergency situations"¹.

This shows that Menem actually enjoyed a prerogative that he created for himself by arbitrary substitution of the Congress and, as Rubio and Goretti underline after careful analysis of more than 13 500 presidential acts, between 1989 and 1994, Menem used the NUDs explicitly in 166 cases (49%) of the instances, and without even assuming the title of a NUD in 170 cases (51%)². And with respect to the relationship between the President and the Supreme Court, although the latter has the right to formulate an opinion on the constitutionality of the NUDs, the latter proved in fact to be a trustworthy carrier of the presidential will. It is most striking to see that the Court not only endorsed the presidential "paraconstitutional" lawmaking prerogatives, but also offered a formal justification for his acts. As Goretti and Rubio observe, the Supreme Court in its enlarged version, redefined the notion of an emergency as:

"An extraordinary situation that affects the economic and social order, with its effect of accumulated uneasiness, through scarcity, poverty and indigence, creating a state of necessity that requires solution"³.

This state of virtual neutralization of all competing institutional veto players in a context in which the legislative opposition was weak, unwilling or unable to block most of the presidential initiatives, led in 1994, before the end of Menem's mandate, to an apparently surprising settlement between the two main parties, the Peronist party and the Union Civica Radical. This agreement, which provoked a massive wave of indignation and again proved to be extremely costly for the leader of the opposition, the ex-president Raul Alfonsin, was focused precisely on the issue of the independence of the judiciary. In exchange for the promise to guarantee the formation of a neutral body responsible for the nomination of prosecutors and to institutionalize the use of Necessity and Urgency Decrees with a dramatically narrower scope in the new constitution, Menem was allowed to initiate a constitutional reform allowing him to stand for reelection as president. Although the Olivos Pact was largely disapproved by the anti Peronist public, seen as a reprehensible concession made to an undemocratic president, the elite agreement's objectives were actually an essential stage in the institutional building of the Argentine democratic regime after the 1983 transition, a reform that made the first step in redrawing the scope of legitimate authority of the essential figure of that system: the president. In essence, Menem was allowed to renew his mandate, but under tighter formal constraints on the presidential function and, most significantly, by reinstating the judiciary as a relevant actor in checking the executive.

The rational calculation made by the main opposition actor, UCR, proved actually to bring only partial benefits as the compromise with the Peronist party was a serious blow to Alfonsin's party that lost a significant part of the support of the human rights

¹ Delia Ferreira RUBIO, Matteo GORETTI, "When the President Governs Alone...cit.", p. 41.

² *Ibidem*, p. 43.

³ *Ibidem*, p. 55.

movements and of that large segment of the society that desired a further reform of state institutions and saw Menem as both a corrupt politician and the person most responsible for the impunity of the "Dirty War"'s officers. Moreover, the president continued to exert strong informal pressures on the judiciary in the next mandate and the thorough institutional reforms Alfonsín hoped to encourage through the Olivos compromise were only partially accomplished.

Tsebelis' 1995 path breaking study on veto players discussed only tentatively the role of the courts as such crucial actors in democratic regimes, and he made an observation that could be amended in light of the experience of Argentina. When stating that: "An institutional player will not count as a veto player unless it has formal veto power"¹, this general condition should be accompanied by an additional study, adapted to each institutional setting, pattern of elite structure and interactions and the presence or absence of informal veto players, to specify the various constraints and irregular forms of pressures exercised on the courts. In a similarly cautious manner, a study of the number of veto players in settings like the Argentine democracy should also take into consideration the distance between the formal endowment of the institutional actor under consideration and the actual scope of its activity.

My aim in this paper was to search for a new perspective on a much discussed issue in comparative politics, that of institution building after a transition from dictatorship. Far from being an exhaustive study of this topic, this inquiry privileged the assessment of the viability of the relationship between the executive and the judiciary not by the analysis of the formal prerogatives of the two power branches, but by an evaluation of their capacity to confront a most challenging political dilemma of a post-authoritarian regime – criminal trials against human rights perpetrators, all the more difficult when they are military officers of a historically poorly institutionalized army. Although this topic continued to suffer radical changes after the end of the period covered in this paper and until very recently, in a spiral of convictions, amnesties, pardons and again convictions, the first decade of the Argentine democracy is a most interesting opportunity for the study of the ever unstable game of elite negotiations and variable degrees of accommodation with formal rules of a democratic political game whose shape is itself the major stake of elites' interactions and negotiating strategies or second order preferences. But beside this contingent process of give and take, highly sensitive to the willingness of one key person – the president, to abide by the limits to his prerogatives, I am witnessing during this first democratic decade another crucial phenomenon, that of a progressive, equally unstable process through which institutions take shape and test the boundaries of their prerogatives by conflicts with one another.

In this sense, the test of transitional justice proves to be a useful instrument of the performance of institutions. This is very well illustrated in Argentina's experience of its first democratic decade during which multiple clashes between the judiciary and the executive and/or the legislative around the issue of criminal trials significantly influenced the form of the policies of transitional justice, with results very much different from the initial intention with which Alfonsín triggered a process he thought he will be able to keep under control. In this respect, Argentina is an ideal instance from which to draw valuable observations about contingency in policy making, especially about the weight of individual actors and groups (courageous or defiant enough)

¹ George TSEBELIS, "Decision Making in Political Systems...cit.", p. 305.

to push the boundaries set by other actors and redirect a policy's meaning towards new societal and political consequences. Argentina's experience with transitional justice is in this respect a fascinating case of interactions between institutions, each with its own agenda (set by both its formal prerogatives and the values, interests and constraints that motivate it at a certain historical point in time), illuminating the above observation about contingency. The initial move made by the president Alfonsín in favor of a limited form of prosecution for very serious human rights violations suffered a significant change of track once the judiciary came in control of its execution, thus triggering new societal and political constraints on the executive caught between human rights movements' expectations and the officers' radical opposition to trials. This will lead to a strenuous clash between the three branches of power in a growing centrifugal game that will finally prove itself to be an essential test for the new institutional setting and determine both formal and legitimate and informal and highly illegitimate pressures for the change of this potentially stalemate situation in the future. The analysis of the pressures on the judiciary during Menem's mandate can also help to understand more about the presidential function in a fragile democracy, despite a vibrant civil society that brought the transition to democracy in the first place. Despite legitimate expectations one could have drawn from the moderate mandate of Alfonsín with respect to the independence of the judiciary even in such critical instances like the military threats to the new democratic regime, Menem did not hesitate in subordinating the judiciary in his own service and much less did he suffer the consequences of his obviously corrupt and arbitrary conduct. On the contrary, the political context and the elites' agreements led to the renewal of his mandate and to a deepening of his negative legacy for the Argentine polity, observable in patterns of individual and institutional attitudes until the present day.

In the presidential mandate of Menem's successor, Fernando de la Rúa, a member of UCR, a new wave of judicial activism reconsidered the presidential amnesty decreed at the end of the 1980s. What is worth emphasizing in this new wave is that the untouchable presidential decree was simply overturned in a court of justice by a federal judge who declared the due obedience act and the amnesty simply "unconstitutional, null and void"¹. I consider suggestive the fact that the judge acted as a prime-mover in neutralizing these formal obstacles to criminal prosecution and that the court's decision did not meet substantial efforts to be overturned from other actors. As Acuna observes, however, and I should corroborate this with the Chilean experience with international judicial activism, the attitude towards the prosecution of the four Argentine military juntas drastically modified among national political actors once the Spanish initiatives against Videla were met with strong approval by international bodies².

¹ Carlos ACUNA, "Transitional Justice in Argentina and Chile: A Never-Ending Story?", in Jon ELSTER, *Retribution and Reparation in the Transition to Democracy*, Cambridge University Press, New York, 2006, p. 221.

² *Ibidem*.